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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

AUG 29 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Local Exchange Carriers' Rates )  
Terms, and Conditions for )  
Expanded Interconnection for )  
Special Access )

CC Docket No. 93-162

TO: Chief, Common Carrier Bureau

COMMENTS OF  
SOUTHWESTERN BELL TELEPHONE COMPANY

Southwestern Bell Telephone Company (SWBT), by its attorneys, and pursuant to the Commission's July 26, 1994 Public Notice,<sup>1</sup> respectfully submits these Comments in support of Bell Atlantic's Petition for Clarification of certain language in an Order released on May 31, 1994.<sup>2</sup>

The language that Bell Atlantic requests the Common Carrier Bureau (Bureau) to clarify contradicts the April 5, 1994 decision of the U.S. Court of Appeals for the D.C. Circuit concerning the use of individual case basis (ICB) contracts in connection with dark fiber<sup>3</sup> as well as certain prior Commission orders. For example, the Bureau states that:

"Once sufficient knowledge is gained about the costs of the service, the Commission requires

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<sup>1</sup> DA 94-821

<sup>2</sup> Supplemental Designation Order and Order to Show Cause, 9 FCC Rcd 2742 (1994).

<sup>3</sup> Southwestern Bell Telephone Company v. FCC, 19 F.3d 1475 (D.C. Cir. 1994) (Dark Fiber Decision).

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that the ICB rates be converted to averaged rates applicable to all customers."<sup>4</sup>

The Bureau's language ignores the impact of the Dark Fiber Decision on its inconsistently applied ICB policy. The Court, in the Dark Fiber Decision, made it clear that an ICB arrangement -- in and of itself -- could not subject a carrier to Title II regulation. As the Court stated,

"[I]t does not make sense that the filing of the terms of any contract . . . with the FCC, without more, reflects a conscious decision to offer the service to all others on a common carrier basis."<sup>5</sup>

Thus, contrary to the Bureau's statement, some ICB rates do not need to be converted to averaged rates, even after the carrier has gained sufficient knowledge about costs of the service, because they can be rates for private, and not common carrier, service arrangements. The Court followed prior decisions which reasoned that "one can be a common carrier with regard to some activities but not others."<sup>6</sup>

The Order implies that carrier ICB offerings must be generally available to all similarly situated customers, whether or not the offering meets the test for common carriage.<sup>7</sup> This mistaken belief is evident in the Bureau's citation to language in

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<sup>4</sup> 9 FCC Rcd at 2744 ¶ 17.

<sup>5</sup> 19 F.3d at 1481.

<sup>6</sup> Id. (quoting NARUC II, 533 F.2d at 608).

<sup>7</sup> 9 FCC Rcd at 2744, n. 35.

the 1989 DS3 ICB Decision<sup>8</sup> which is also inconsistent with the Dark Fiber Decision because of its assumption that ICBs necessarily involve unreasonable discrimination under Title II and must evolve into common carrier offerings.

Not only is the Order's language inconsistent with prior orders and previous statements of ICB policy, as noted by Bell Atlantic, but the Order also reflects a dissonant application of policy regarding ICB pricing. Contrary to the Order's language, the Bureau does not require SWBT's competitors' "rates to be converted to averaged rates applicable to all customers."<sup>9</sup> Instead, the Commission has allowed SWBT's competitors to incorporate language in their tariffs which would allow continued use of ICB pricing,<sup>10</sup> while rejecting SWBT's identical ICB tariff language.<sup>11</sup> Despite the Bureau's interpretation of the Communications Act as allowing ICB pricing in its Acceptance Order, the Bureau has refused to apply this interpretation to SWBT.

The Order adds to the confusion regarding Commission policy toward ICBs and ICB pricing. This language should either be

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<sup>8</sup> Local Exchange Carriers' Individual Case Basis DS3 Service Offering, 4 FCC Rcd 8634 (1989) (DS3 ICB Decision).

<sup>9</sup> 19 FCC Rcd at 2744 ¶ 17.

<sup>10</sup> Teleport Communications Group Operating Companies, Tariff F.C.C. No. 1, Transmittal No. 1, et al. 8 FCC Rcd. 3611 (Com. Car. Bur. 1993) (Acceptance Order), application for review pending, Application for Review of Southwestern Bell Telephone Company, filed June 10, 1993.

<sup>11</sup> Southwestern Bell Telephone Company Revisions to Tariff, F.C.C. No. 73, Transmittal No. 2297, Order (DA 94-204) (Com. Car. Bur. 1994).

vacated or be clarified so as to be consistent with the Commission's precedents, as modified by the Dark Fiber Decision. Further, if the Commission does not vacate this language, then the Commission should clarify that ICB filings are permitted for truly private communications services without risk of being deemed "generally available" and that ICB pricing in the manner allowed in the Acceptance Order is permitted equally for all common carriers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Liz Jensen, hereby certify that the foregoing  
Comments of Southwestern Bell Telephone Company in Docket  
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the Parties of Record.

Liz Jensen  
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